

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

DAVID A. HESS,

Petitioner,

v.

**CASE NO. 2:04-cv-1144
JUDGE MARBLEY
MAGISTRATE JUDGE ABEL**

MICHELLE EBERLIN, Warden,

Respondent.

OPINION AND ORDER

On May 12, 2006, the Magistrate Judge issued a *Report and Recommendation* recommending dismissal of claim five of the instant habeas corpus petition pursuant to 28 U.S.C. §2254.¹ Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*. Petitioner again argues that the evidence was constitutionally insufficient to sustain his conviction on carrying a concealed weapon because the evidence failed to establish either his possession or use of the knife as a weapon, and because only one knife was entered into evidence, although testimony reflected that police found a buck knife in petitioner's pocket, and the victim found another knife shoved down into the side of the chair where petitioner had been seated.

Pursuant to 28 U.S.C. 636(b)(1), this Court has conducted a *de novo* review of those portions of the *Report and Recommendation* objected to by petitioner. For the reasons discussed in the Magistrate Judge's *Order and Report and Recommendation*, petitioner's objections are **OVERRULED**.

The *Order and Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action

¹ The remainder of petitioner's claims were dismissed on April 20, 2006. Doc. No. 22.

is hereby **DISMISSED**.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
United States District Judge